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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 540

UNITED STATES OF AMERICA,

Petitioner,

—against—

GRACE A. INGHAM, as Executrix, of the Estate of Paul B. Ingham, deceased.

BRIEF OF RESPONDENT EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This action is one of a number of suits arising out of an Eastern Air Lines, Inc. accident which occurred during deteriorating weather on the night of November 30, 1962. Separate suits were commenced in the United States District Court for the Eastern District of New York by Grace A. Ingham as executrix against Eastern Air Lines, Inc. and the United States of America. Both Complaints alleged independent negligent acts of each defendant as the proximate or concurring cause of the accident. In the suit against the United States a third party complaint was filed by the United States impleading Eastern Air Lines claiming indemnity and contribution. A similar third party complaint was filed impleading the Government in the suit against Eastern Air Lines. The third party complaint against the Government was based upon common law indemnity.

At the completion of the consolidated pre-trial discovery the trial court directed a consolidated trial of the within suits. While not all plaintiffs were prepared to consider this as a "test case" most plaintiffs, at the request of the trial judge, stipulated to be bound by the outcome of the non-jury trial against Eastern Air Lines, Inc. and the United States of America.

The trial was lengthy and culminated in an Opinion and Additional Findings of Fact and Conclusions of Law holding Eastern and the Government liable to the plaintiff and dismissing both third-party complaints (1290a-1324a).* The Court of Appeals for the Second Circuit unanimously affirmed the decision below. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227. This opinion is also found at pages 1a to 27a of the Petition.

Petitioner's present arguments in support of a Writ of Certiorari, i.e., the "misrepresentation exception", alleged compliance with FAA regulations and failure to establish proximate cause were all carefully considered by the trial court and the Court of Appeals. Both courts completely rejected the Government's contentions. We respectfully submit that this Court should make a similar disposition of the instant Petition. The Petition for a Writ of Certiorari should be denied forthwith.

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* Unless otherwise designated page references refer to pages of the Joint Appendix.

The Facts of the Case

We do not believe that this Court should become involved in the fact issues decided below. However, since the Petitioner has portrayed a fact picture we find it necessary to make some elaboration in order to put the fact questions in their proper perspective.

The Air Traffic Control Facilities

The Government's responsibility for air traffic control is spelled out by federal statute. Section 1348 of 49 U. S. Code provides:

> "Airspace control and facilities—Use of airspace
>
> "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order *to insure the safety of aircraft* and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest." (Our emphasis).
>
> * * * *
>
> "Air traffic rules
>
> "(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the *navigation, protection, and identification of aircraft, for the protection of persons and property* on the ground, and for the efficient utilization

> of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." (Our emphasis).

On the night of the aceident the Government had assumed this obligation and was required to provide Air Traffic Control Service to Eastern Flight 512. This service was defined in Section 120 of the Air Traffic Control Procedures Manual (Plaintiff's Ex. 38) as:

> "A service provided for the purpose of promoting the safe, orderly and expeditious flow of air traffic, including airport, approach and en route air traffic control services."

This service was furnished by Approach Controller Ketterman who operated from the IFR Room of the tower and Local Controller Siebert whose position was in the Tower Cab (348a). Ketterman communicated with the flight by voice radio and followed it on his radar scope; Siebert also communicated by voice radio. In addition, Siebert visually observed the flight on its let-down to the runway.

The facts adduced at the trial and referred to by the trial and appellate courts clearly establish that the Government had a non-delegable duty to the traveling public and to Eastern Flight 512. It was obliged to furnish this flight with accurate, up-to-date and complete reports of the existing weather and subsequent changes as necessary (Plaintiff's Exs. 38, 40, 41 and 46). In finding against the Government both the trial court and the unanimous Court of Appeals specifically referred to the controller's mandatory obligation set

forth in Section 265.2 of the Air Traffie Procedures Manual (Plaintiff's Ex. 38) which provided:

> "265.2 At locations where official weather reports are obtained by the controller through routine procedures and the ceiling and/or visibility is reported as being at or below the highest 'circling minima' established for the airport concerned, a report of *current weather conditions, and subsequent changes,* as necessary, shall be transmitted as follows:
>
> A. By centers, as part of the approach clearance, to all aircraft to which the approach clearance is delivered directly to the pilot by the center controller;
>
> B. *By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter;* * * *" (Our emphasis.)

This regulation was binding on both Ketterman and Siebert.

Ketterman first came in contact with the flight at 9:24:15 P. M. The flight was given the weather as:

> ". . . Wind calm. The Idlewild weather, sky partially obscured, *visibility one and one-half miles with fog.* * * *" (Plaintiff's Ex. 16, page 39, our emphasis).

Approximately six (6) minutes later at 9:30:26 P. M. he broadcast weather to all aircraft as:

> ". . . Idlewild weather, sky partially obscured, visibility . . . *one mile with ground fog . . .*" (Plaintiff's Ex. 16, page 46, our emphasis).

Three minutes later, at 9:33:57 P. M., he repeated the same weather to all aircraft.

Prior to this time the weather had deteriorated considerably. At 9:32:42 P. M. Controller Speiselman, who was sitting next to Ketterman broadcast visibility as three-quarters mile (Plaintiff's Ex. 19, page 2). At 9:32:49 P. M. Controller Nelson gave the same critical, 25% reduction in visibility to the aircraft he was controlling (Plaintiff's Ex. 18, page 12). Admittedly it was Ketterman's job to give the latest available weather information (583a) yet he never gave this critical change to Eastern 512. Nor did Ketterman give the flight the other *subsequent changes,* i.e., surface visibility reduction to one-quarter mile and fog coverage increase to eight-tenths, all of which indicated a further deterioration of the weather below landing minimums. Thus, when Flight 512 commenced its final ILS approach it was totally ignorant of the true weather conditions. Siebert compounded Ketterman's error by a similar neglect in failing to report the existing weather to the flight.

Activity in the Tower Cab centered around Local Controller Siebert. He handled Flight 512 on its final approach to the runway. Flight 512 checked in on the Local Control Frequency at approximately 9:40. The crash occurred at approximately 9:45. During this five minute period Siebert neither advised the flight of the actual weather conditions as reported by the Weather Bureau nor did he advise the flight of the fog conditions being experienced by the other aircraft reporting to him.

Below we also referred to the negligent handling of the Government's weather detecting equipment

known as the Runway Visual Range System. We also referred to the violation of Government regulations governing visibility observations. However, since neither is necessary for the court's consideration of the current Petition they will not be outlined here.

The Approach of Eastern Flight 512

Flight 512 was in command of Captain Ed Bechtold. Like his crew he was highly qualified and well trained in the operation of the DC-7 (204a). Prior to his untimely death Captain Bechtold had been a crusader for air safety. He headed the Air Line Pilots Association (ALPA) accident investigating team and served as a Region Safety Chairman (945a-950a).

During initial and recurrent training as well as on check flights the members of this crew were drilled and checked in the missed-approach or go-around procedure (159a, 168a). Generally speaking the aircraft commander was required to execute a missed approach if *at any time* after passing the middle marker on his approach—a point approximately a half mile from the threshold of the runway—he lost sight of the runway (119a). Thus the need to know actual weather conditions increases as the visibility decreases (635a). Eastern's regulations and those of the Government required the execution of the missed approach *no matter how low the aircraft had descended in its landing configuration* (129a). The Captain had no choice. If he couldn't see the runway he couldn't land—no matter how close he was (Plaintiff's Ex. 3, Sec. 3-9, p. 4, 623a).

Throughout this flight it was subject to Governmental control. It was prohibited from operating contrary to Air Traffic Control instructions (14 CFR 60.19). In addition to expecting positive control from the Air Route Traffic Controllers, Approach Controller and Local Controller Captain Bechtold had reason to expect that he would be kept continuously advised of *current weather* conditions at the airport and runway visibility for the runway in use (636a, 640a-642a). *This was an obligation assumed by the Government* (Plaintiff's Ex. 38, Section 265.2 and Plaintiff's Ex. 46). Consequently Captain Bechtold was entitled to rely upon the information given to him as being the most current and truly representative of the conditions which he could expect at Runway 4R—the runway to which he was directed by the Government.

After circling in a holding pattern for some time Flight 512 was released to Approach Controller Ketterman at approximately 9:24 P. M. At this time the flight was advised that Runway 4R was in use, that the sky was partially obscured and visibility was one and a half miles (Plaintiff's Ex. 16, page 39). This visibility was well within the one-half mile landing minimum for this runway. Flight 512 continued its approach. It was vectored by Ketterman who followed the flight by radar along the Instrument Landing System (ILS). At 9:30 P. M. and again at 9:34 P. M. Ketterman advised that the visibility was one mile with ground fog. Although Capt. Bechtold continued on his approach for another eleven (11) minutes the Government admits that it furnished no further advices with respect to the current visibility and runway conditions nor subsequent changes (373a-374a).

During this eleven (11) minute period substantial changes occurred which were well known to Ketterman at Approach Control and Siebert at Local Control. Both Controllers were being constantly advised that a severe ground fog condition existed on Runway 4R; that tower visibility had decreased to three-quarters of a mile (695a); that surface visibility had decreased to one-quarter mile (684a, 687a); and that fog coverage had increased from two-tenths to eight-tenths of the sky (785a, Finding 12—1306a). None of this vital information was passed on to Flight 512 although both Ketterman and Siebert were in constant radio contact with the flight (Plaintiff's Exs. 16, 18, 21, Finding 17—1307a). Rather the Government permitted the crew to be lulled into a false sense of security as to the actual runway conditions.

As the flight approached the airport and from a height and at a distance from the runway the terminal area was clearly visible. Not so in the immediate area of the runway. The insidious nature of this type of fog, dense in horizontal proportion but shallow in its vertical component, made it extremely dangerous to landing aircraft. Due to its thin vertical development, the fog presented a deceptive picture. While above the fog the passengers and crew were able to see high intensity lights on the ground without much difficulty. As the aircraft descended through the top of the fog layer, Captain Bechtold was no longer looking down through 50 feet of dense fog but was looking horizontally out into several thousand feet of dense fog. The effect was similar to pulling a curtain down before his eyes. Since Captain Bechtold had based his decision to continue his approach upon information that

the visibility at the airport had been constant at "one mile" for some fifteen (15) minutes and that neither the fog cover nor the surface visibility had changed he could not have anticipated what he found. Faced with this sudden emergency he reacted as his training demanded—he lost sight of the runway—he was required to attempt to execute a missed approach. He had to make an almost instant decision (613a).

Flight 512 had been followed on radar by Ketterman and visually by Siebert. Both agreed that its approach was *normal*. Similarly the surviving passengers who testified as well as the stewardesses agreed that the approach was *normal* almost to the point of touchdown. Siebert saw Flight 512 as it passed the middle marker six-tenths of a mile from the threshold of Runway 4R (610a). He watched 512 until its "Grimes Light faded from view as the aircraft entered the ground fog" (Plaintiff's Ex. 48, 609a). Examination of the wreckage evidenced that efforts had been made to fly out. Speed had been increased (982a) and flaps and landing gear had been adjusted (1161a, 1281a). According to Perry, an employee of the aircraft manufacturer, the aircraft had attained sufficient speed and was properly configured to make a missed approach *unless* the aircraft ran out of altitude. In fact, this is what occurred. Undisputed mathematical computations (Eastern's Ex. KK 976a-984a) conclusively established that once Flight 512 was lured into this fifty foot thick ground fog the accident became inevitable. The crew no longer had the time nor the altitude to recognize the situation and successfully execute a missed approach.

POINT I

The Government's contentions with respect to the "misrepresentation exclusion" are sham. They are designed to draw this Court into a review of questions of fact.

The Government's defense of the "misrepresentation exclusion" of the Federal Tort Claims Act was characterized by the Court of Appeals as a "second line of defense". Indeed, it was such a remotely considered defense that it was never pleaded nor was it argued during the course of the trial. It first appeared in the post-trial brief. As far as we know it has never been raised before or since in an aircraft accident where actions of FAA Control Tower operators are at issue and where the gravamen of the complaint is negligent performance of operational tasks.

Perhaps the best answer to the Government's position on this exception is found in the unanimous opinion of the Second Circuit. Writing for the Court, Judge Kaufman said:

> "Nevertheless, the Government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the Government that involved communications in any form." (Page 22a of Petition).

In any event, all argument on this point appears to fall before the ruling of this Court in *U. S.* v. *Neustadt*, 366 U.S. 696. It will be recalled that *Neustadt* dealt with the application of the misrepresentation excep-

tion as applied to a claim arising out of an inaccurate inspection and appraisal report prepared by the Federal Housing Administration. In a footnote this Court answered the Government's present contentions:

> "Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co.* v. *United States,* 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' Prosser, Torts, Sec. 85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed.). See also 2 Harper and James, Torts, Section 29.13, at 1655 (1956)."

The Court of Appeals relied on this same language in rejecting the Government's contentions (Petition, pp. 23a-24a). Despite its argument of a "conflict" between Circuits on the application of this exception it should be noted that the Government has failed to

demonstrate the "conflict" by reference to similar reported cases.

The logic in rejecting the "misrepresentation exception" is clear when viewed in the light of the many cases wherein the Government has been held liable in aircraft accidents for communication errors of omission or commission. *Union Trust Co.* v. *U. S.*, 113 F. Supp. 20 (DC 1953) affd. sub nom. *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (DC Cir. 1955) affd. sub nom. *United States* v. *Union Trust Co.*, 350 U. S. 907; *United Air Lines* v. *Wiener*, 335 F. 2d 379, 392-8 (9th Cir. 1964).

The Federal Courts have had numerous opportunities to consider the failure of the Tower personnel to warn aircraft of hazards known to the Tower. In *United States* v. *Douglas*, 169 F. 2d 755 (C.C.A. 9, 1948) the Court held that actionable negligence could be based upon the control tower's *negligent failure to warn* an aircraft coming in for a landing of an impediment on the field in the form of a parked plane. The Court stated:

> "The air traffic tower agency of plaintiff had authority and control over traffic and would appear to be in the best position to take precautions for the removal of parked planes as hazards to traffic or to *warn and advise appellees'* pilot of the parked planes' position. Whether or not the action or non-action of the traffic tower in any instance was customary, its operation may constitute negligence." (Our emphasis).

Similarly, in *Hochrein* v. *United States*, 238 F. Supp. 317, the Court referred to the controller's obligation

to provide information necessary to the pilot to discharge his responsibility for his own safety:

> "The regulations outline Toon's duty as an air traffic controller and in effect require a controller to aid and assist the pilots of aircraft within the control zone. This assistance takes a variety of forms including the issuing of clearances and disseminating information regarding traffic in the pattern and control area. * * * Controller Toon failed in his obligation to pass on information which may be necessary for a pilot to discharge his responsibility for his own safety." (P. 319).

In *United States* v. *Schultetus*, 277 F. 2d 322, 328 (1960) the Court of Appeals for the Fifth Circuit referred to this same duty. In addition, it pointed out that when aircraft are operating under instrument conditions there is a greater duty and responsibility on the part of the Tower operators to these aircraft than when the same aircraft are operating under VFR conditions. Conversely a lesser responsibility rests upon the pilot.

More recently in *Furumizo* v. *United States*, — F. 2d — (1967), the Court of Appeals for the Ninth Circuit affirmed a finding of liability on the part of the Government due to the negligent performance of operational tasks by the Tower operator (245 F. Supp. 981). Among other things, both the trier of the facts and the Court of Appeals referred to the duty of the Control Tower personnel to warn pilots of dangerous conditions. In another recent District Court decision, *State of Maryland, et al* v. *United States*, ——F. Supp. —— (USDC - DC - 1966) previously considered by this Court, Judge Holtzoff made a similar finding

against the Government pointing to the negligence of the Traffic Controllers in failing to communicate a timely warning to the crew of the Capital Airlines' aircraft. The "misrepresentation exception" was not relied upon by the Government in either of these cases and it is significant to note that the Government has agreed to pay the judgment in the *State of Maryland* case.

The foregoing discussion clearly demonstrates that the Government's contentions with respect to the "misrepresentation exception" are without merit. The gravamen of the instant complaint was the negligent performance of operational tasks by Government personnel in the Control Tower. The courts below found that the negligent failure of the Government to inform Flight 512 of the visibility decrease was a proximate and concurrent cause of the accident (Petition, p. 19a). The Government cannot absolve itself of liability by contorting the decisions of this Court on the question of the application of the "misrepresentation exception".

POINT II

The questions of fact presented by the Government for review do not warrant the attention of this Court. However, if certiorari is granted this Court should also grant certiorari to Eastern Air Lines, Inc. for a review of the same facts. To do otherwise would be to grant a review of the facts in a semi-vacuum.

While we did not agree with the findings below in so far as they related to Eastern, we did not seek certiorari because these were factual findings concurred in by both lower courts. We continue of this opinion and we believe the short factual summary which we have presented substantiates the conclusion which we reached.

The Government's petition fails to demonstrate a factual situation which cries for the attention of this Court. By a selective reading of the record it seeks to create confusion. It seeks to establish that the courts below ignored significant testimony which cleared the Government of any responsibility for this tragic accident. However, it falls far short of its goal.

The Court below, in analyzing the case against the United States, recognized the unwarranted attempts of the Government to rely upon a myriad of complex regulations (Petition, p. 11a) and an inordinately narrow interpretation of these regulations (Petition, p. 13a). Simply stated the Court of Appeals ruled that by regulation Ketterman, the Approach Controller, was required to transmit current weather and

"subsequent changes which, under all circumstances, the crew would have considered important both in determining whether to attempt a landing, and in preparing for weather conditions most likely to be encountered near the runway" (Petition, p. 14a). The Court found that the 25% drop in visibility was such a *critical change* that in the interests of safety it should have been reported to the crew of Flight 512. It concluded that the Approach Controller was negligent in failing to report it and that this failure was a proximate and concurrent cause of the accident. In reaching this conclusion the Court of Appeals referred, among other things, to the heavy degree of reliance which passengers place upon the Government for insuring the safety of their flights—a fact the Government ignores in its Petition. The Court also referred to the pilot's need to know that weather conditions were becoming marginal.

In the event this Court finds merit in the Government's contentions with respect to these factual findings then we respectfully submit that certiorari should also be granted to Eastern Air Lines for a review of the same facts in so far as its liability to the passengers is concerned. To do otherwise would be to deny substantial justice to Eastern Air Lines in a "test case" situation.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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